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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 255.

GERHART EISLER, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

BRIEF AMICUS CURIAE OF THE NATIONAL LAWYERS GUILD.

NATIONAL LAWYERS GUILD,
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STATEMENT.

The National Lawyers Guild is a bar association with a nation-wide membership. Under its charter it is pledged "to protect and foster our democratic institutions and the civil rights and liberties of all the people."

Its particular concern with the constitutional issues here involved appears from the briefs *amicus curiae* already filed by it in this Court in various proceedings upon certiorari to review prior convictions for contempt of the House Committee on Un-American Activities and involving the same issue to which this brief is addressed. *Josephson* v. *U. S.*, October Term 1947, No. 535, 333 U. S. 838, 858;

Barsky et al v. *U. S.*, October Term 1947, No. 766, 334 U. S. 843; *Dennis* v. *U. S.*, October Term 1948, No. 436.

This concern has now become part of a mounting tide of criticism and protest directed at the committee's proceedings by the President of the United States, the Justice Department, leading legal periodicals, responsible editorial opinion and noted commentators here and abroad. See, President Truman, *Washington Evening Star*, August 19, 1949; *Department of Justice Release*, September 29, 1948; Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harvard Law, Rev. 1193; Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L. J. 1; Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. Law Rev. 416 (1947); Prof. Zachariah Chafee, Jr., *Washington Post*, December 13, 1948; Editorial, *New York Herald Tribune*, Oct. 22, 1947; Editorial, *Chicago Times*, Oct. 22, 1947; Mrs. Eleanor Roosevelt, *Washington Daily News*, Oct. 29, 1947; Article, *P.M.* Oct. 27, 1947; Editorial "As Others See Us", *Washington Post*, April 29, 1948; "Don Iddons Diary", *Sunday Mail*, Brisbane, Australia, Nov. 2, 1947; House of Bishops of Protestant Episcopal Church of the United States, *New York Herald Tribune*, Nov. 8, 1947, p. 4; Prof. Henry Steele Commager, "Who is Loyal to America", *Harper's Magazine*, Sept. 1947, p. 193; Kahn, *Hollywood on Trial*, N. Y. (1948), foreword by Thomas Mann.

The extent of this Committee's encroachment upon the constitutionally protected areas of speech and assembly is well stated in the dissent by Mr. Justice Edgerton in *Barsky* v. *U. S.*, 167 F. 2d 241:—". . . it is nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure." We believe that this dissent together with that of Judge Clark in *Josephson* v. *U. S.*, 165 F. 2d 93 take the only possible position consonant with the Bill of Rights upon the invalidity of this Committee's entire authority. Their essential soundness is confirmed by

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the widespread public protest above referred to, against the Committee's operations. As with the historic "civil rights" dissents by Justices Holmes and Brandeis in the 1920's, their public acceptance has thus far preceded their acceptance as judicial doctrine.

Coming here upon unlimited certiorari, this case affords a timely opportunity to give the force of supreme authority to the constitutional doctrine of these dissents and to put an end to widespread and well-grounded public apprehension concerning this Committee and its threat to constitutional liberty.

There is no other constitutional protection against its constant encroachment upon the protected areas of thought, speech and assembly, which, if unchecked, will give the sanction of law to political conformity, and make our Bill of Rights a dead letter. "No higher duty, no more solemn responsibility, rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—*of whatever race, creed or persuasion*" *Chambers* v. *Florida*, 309 U. S. 227, 241 (1940) (our italics).

This brief will be confined to that issue.

ARGUMENT.

The Statute and Resolution Creating the House Committee on Un-American Activities are Unconstitutional in that They Authorize on Their Face, and in Practice Have Consistently Resulted in, a Limitless Inquiry Into the Areas of Speech, Assembly, and Association Protected by the First Amendment.

The First Amendment guarantees to all persons without regard to race, nationality or persuasion, the right freely to think, speak and assemble in furtherance of their political and religious ideas. In a word, it precludes from the law-

making province of Congress the entire area of human affairs comprehended by religion, speech, peaceable assembly, the press and the right to petition for a redress of grievances. "The First Amendment is a charter for government, not for an institution for learning. Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given". *Thomas* v. *Collins*, 323 U. S. 516, 537 (1945)

This and a whole series of related decisions by this court during and following the 1930's in which the sweep of the First Amendment's protection was proclaimed repeatedly and with unfailing eloquence, *De Jonge* v. *Oregon*, 299 U. S. 253, 365 (1937); *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943); *Board of Education* v. *Barnette*, 319 U. S. 624, 641-642 (1943); *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940); *Schneiderman* v. *U. S.*, 320 U. S. 118, 137 (1942), were believed to have put the full force of authority at long last behind the school of First Amendment interpretation defined a decade earlier in the historic dissents by Justices Holmes and Brandeis. *Whitney* v. *California*, 274 U. S. 357, 377 (1927); *Gitlow* v. *New York*, 268 U. S. 652, 673 (1925); *Schaefer* v. *U. S.*, 251 U. S. 466, 495 (1920); *Abrams* v. *U. S.*, 250 U. S. 616, 630 (1919). Mr. Justice Rutledge, writing for three members of the court in *Musser* v. *Utah*, 333 U. S. 95 (Feb. 9, 1948), has now encouraged the hope that, despite certain recent vicissitudes *Friedman* v. *Schwellenbach*, 330 U. S. 848, 331 U. S. 865; *Josephson* v. *U. S.*, 333 U. S. 838, 858; *Barsky* v. *U. S.*, 334 U. S. 843, the belief has not been wholly unfounded.

In our view, it is impossible to reconcile with the mandate of the First Amendment, the statute and resolution creating the House Committee on Un-American Activities, the authority which it purports to confer and, by no means least important, the consistent operation of the Committee there-

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under for the decade or more that it and its predecessors have existed.*

The statute and resolution would authorize the Committee to investigate "un-American propaganda activities" and "subversive and un-American propaganda" that "attacks the principle of the form of government as guaranteed by our Constitution". Now, "propaganda" is "... a plan for publication of a doctrine or system of principles." *Leubuscher* v. *Commissioner* (C. C. A. 2, 1942) 54 F (2d) 998, 1000; cf. Funk and Wagnall's New International Dictionary (1943), p. 1985. It is a word that means precisely the dissemination of ideas. Its connotations fall entirely within the realm of opinion, thought, speech, publication, advocacy, the very things which the First Amendment declares to be immune from all Government restriction, regulation, or encroachment.** Thus, this power of

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* The present Committee is the successor, without change in character or authority, of the Dies and Wood-Rankin Committees of prior Congresses. The identity in function, power and avowed purpose is so complete that the entire succession may be regarded, for all but purely formal purposes, as one continuing Committee. For the prior resolutions, see H. Res. 282, 75th Cong. 3rd Sess.; 83 Cong. Rec. 7568, 7586 (1938); H. Res. 26, 76th Cong., 1st Sess.; 84 Cong. Rec. 1098, 1128 (1939); H. Res. 321, 76th Cong. 3rd Sess.; 86 Cong. Rec. 572, 605 (1940); H. Res. 90, 77th Cong. 1st Sess.; 87 Cong. Rec. 886, 899 (1941); H. Res. 420, 77th Cong. 2nd Sess.; 88 Cong. Rec. 2282, 2297 (1942); H. Res. 65, 78th Cong. 1st Sess.; 89 Cong. Rec. 795, 810 (1943); H. Res. 5, 79th Cong. 1st Sess.; 91 Cong. Rec. 10, 15 (1945).

** The statute and resolution are equally repugnant to the Fifth and Sixth Amendments in that the terms in which they purport to define the Committee's investigative authority are so devoid of legally cognizable meaning that they wholly fail in those standards of clarity and definiteness required by those Amendments to sustain a charge of crime. *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, 89, 92 (1921). "Un-American" and "subversive", the crucial statutory words in this connection, are no more than so many opprobrious epithets connoting subjective political judgment concerning the quality of the "propaganda" to be investigated. They do not identify it otherwise. Cf. Note, 47 Col. Law Rev. 416; Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale, L. J. 1, 94-95; 81 Cong. Rec. 3286 (1937); 89 Cong. Rec.

inquiry ". . . sweeps within its ambit . . . activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press". *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98.

To us, it is clear that such an inquiry must abridge political thought, speech, and assembly. To execute an authority conferred in such terms the Committee is bound to probe into the ideas and opinions of those whom it singles out for investigation. From the text of the Resolution itself, therefore, its entire "stock in trade" must be said to occupy an area expressly proscribed by the First Amendment.

It is no answer that the Committee's power was purportedly* conferred in aid of the legislative process. The mere possibility that the Committee may eventually produce some constitutional enactment cannot validate nor put beyond the reach of the Bill of Rights this entire grant of power in all its sweep and vagueness. The effect of any such claim would be to permit Congress to violate the Constitution in the very process of legislating under it. It would introduce into our Constitutional system the startling principle that an unconstitutional means may validly be used if only the end *might* be constitutional. Such a doctrine is wholly unfounded. Cf. *Jones* v. *Securities and Exchange*

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806 (1943); 92 Cong. Rec. A 4742 (1946). Thus they provide an open sesame for investigation of whatever political, social and religious ideas and their advocates may meet the disapproval of individual committee members.

* We say "purportedly" because the Committee has itself repeatedly avowed, and its continuous operation has confirmed, that its major end and purpose are not legislation but "exposure" of individuals and groups whose views it deems incompatible with its own undefined conception of Americanism. H. Rep. No. 2742, 79th Cong., 2nd Sess. 16 (1947). See also, H. Rep. No. 2, 76th Cong., 1st Sess., 13 (1939); H. Rep. No. 1, 77th Cong., 1st Sess., 24 (1941). For its claim to judicial authority, see the reference to it by its chief sponsor as the "grand jury" of America. 91 Cong. Rec. 275. For its notable lack of legislative performance, see 47 Col. Law. Rev. 427, note 109.

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Commission, 298 U. S. 1, 25-26 (1935); *Colonial Sugar Refining Co.* v. *Attorney General* (High Court of Australia), 15 C. L. R. 182, 195 (1912), extended on appeal by Privy Council in L. R. (1914) App. Cas. 231, 257 (1914).

Nor can reliance here upon any supposed legislative purpose of this Committee be reconciled with First Amendment decisions by this Court in recent years in which statutes impinging upon constitutionally protected speech and assembly were successively struck down without regard to ingenious speculation upon whether they might somehow lend themselves to a permitted purpose or application. Compare, *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98 (1940); *Carlson* v. *California*, 310 U. S. 106, 111-112 (1940); *Lovell* v. *Griffin*, 303 U. S. 444, 450-451 (1938); *Herndon* v. *Lowry*, 301 U. S. 242, 263-264 (1937).

Compulsory accountability to any Government body for one's political beliefs or the exercise of the right to act in furtherance of them is so abhorrent to the principles of our constitutional system that the mere provision for any such thing is enough, without more, to violate the First Amendment. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us". Jackson, J., in *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945)

While Congress has undoubted power to investigate, that power like any other is limited by the Constitution and subject to judicial review. *Kilbourn* v. *Thompson*, 103 U. S. 168, 181 (1881); *U. S.* v. *Lee*, 106 U. S. 196, 220 (1882); *McGrain* v. *Daugherty*, 273 U. S. 135, 176 (1926); *Jurney* v. *MacCracken*, 294 U. S. 125, 148 (1934).

Unlimited power to investigate "propaganda" is, we submit, an unconstitutional burden upon the rights guaranteed by the First Amendment. As between those rights and Congress' power to investigate, the former are para-

mount and must prevail. This Court has repeatedly so decided with reference to other powers of Government. *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *A. F. L.* v. *Swing*, 312 U. S. 321 (1941); *Thomas* v. *Collins*, 323 U. S. 516 (1945). The investigative power of Congress can be no exception if the primacy thus accorded the fundamental guarantees of the First Amendment is to continue. Nor are those guarantees limited to the naked right to think and speak. Their protection extends as well to political association and to all the practices normally entailed in translating political ideas into action. Cf. *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Thomas* v. *Collins*, 323 U. S. 516, 537 (1945); *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Baumgartner* v. *United States*, 322 U. S. 665 (1944); *Bridges* v. *Wixon*, 326 U. S. 135 (1945).

The danger inherent in such a power of inquiry gives particular point to the prophetic warning sounded by this Court sixty-seven years ago when, as now, a roving power of investigation by the House of Representatives was asserted as a necessary adjunct of its broad legislative power under the Constitution. The Court then took the occasion to say: "It is all the more necessary that the exercise of the power by this body when acting separately from and independently of all other depositories of power, should be watched with vigilance, and when called in question before any other tribunals having the right to pass upon it, that it should receive the most careful scrutiny". *Kilbourn* v. *Thompson*, 103 U. S. at p. 192. Accord:—Wigmore, *Evidence* (3rd Ed. 1940) Vol. VIII, Sec. 2195, p. 80.

The invalidity of this statute and resolution on their face are confirmed by the actual operation of the Committee over more than a decade. The burdens imposed by it upon constitutionally protected speech and assembly i.e., the punitive publicity ("exposure") and harassment incident to inclusion in the Committee's *ex parte* reports and other pro-

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nouncements and in the public (and private) "hearings" to which may be haled any person or group deemed or suspected by it to be "un-American" or "subversive", will independently sustain the constitutional invalidity of the statute and resolution. Cf. *Thornhill* v. *Alabama*, 310 U. S. at p. 98; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374 (1886).

We make brief reference to some of the Committee's activities which, in their aggregate, have the legal effect indicated.

It has denounced as un-American a whole series of political ideas as such—among them—several measures of moderate social reform. H. Rep. 2748 77th Cong. 2d sess., Jan. 2, 1945, pp. 3, 10, 13, 14, 35, 49; H. Rep. 592, June 16, 1947, p. 12; H. Rep. 2233, June 7, 1946, p. 35. Its chief counsel has attempted to influence news broadcasting in a particular direction. H. Rep. 2223, 79th Cong. 2d. sess. June 7, 1946, p. 12; Cf. Cong. Rec. Jan. 29, 1946 p. A740. In this same connection we refer to the dire consequences to the individuals affected by its *ex parte* "exposures" and irresponsible punitive publicity. Cong. Rec. March 28, 1942 p. 3205; Feb. 8, 1943 pp. 704, 705, 707, 708; Feb. 5, 1943 pp. 654, 656; Cf. *U. S.* v. *Lovett*, 328 U. S. 302; Cong. Rec. March 29, 1940, p. 3695; Oct. 26, 1939 p. 815A; to its blacklist of a million persons or more. H. Rep. 7748, 77th Congress, 2nd Sess., to its use of witnesses to attack political ideas which its members disapprove. See testimony of Gerald L. K. Smith, Hearings, 79th Cong. 2d Sess. Jan. 30, 1946, pp. 20, 60.

We point also to the Committee's markedly soft attitude toward those individuals and groups not coming within its particular condemnation. When a professional anti-Semite —one George Detheridge—proclaiming his views at a Committee hearing, refused to answer questions about his organization, no contempt citation was voted. Hearings, 76th Cong. 1st sess. Vol. 5, 1939, p. 3455 ff. Similarly, the Committee has steadfastly refused to "expose" the Ku Klux Klan, the Christian Front and other specified fascist

and anti-Semitic organizations. Cong. Rec. Oct. 24, 1945, pp. 10181-10182. On one occasion the anti-Semitic harangues on the floor of the House by the Committee's ranking minority member reached such proportions that the Speaker was obliged to intervene. Cong. Rec. Oct. 24, 1945, pp. 10187-10189. For further evidence of the same trend, see 92 Cong. Rec. A872, 1444 (Feb. 19, 1946). It is no wonder that the Committee has been warmly praised in certain quarters. Cong. Rec. Feb. 10, 1943, p. 798.

The Committee's hearings, *ex parte* pronunciamentos and other procedures have evoked severe criticism in and out of Congress. "We can say anything we like about people and they have no recourse". Rep. Dempsey, Cong. Rec. Jan. 23, 1940, p. 587. Rep. Voorhis resigned his Committee membership in bitter protest. Cong. Rec. June 24, 1942, p. 2451. Other Congressmen have from time to time expressed themselves to the same effect with equal vigor. Cong. Rec. Feb. 3, 1939, p. 465; Feb. 9, 1939, p. 1108; Jan. 23, 1940, p. 580. Nor has the Committee's assumed scope and manner of operation escaped sharp judicial criticism. *Reeve* v. *Howe*, E. C. Pa. (1940), 32 Fed. Sup. 619 (unlawful search and seizure by Committee agents); *Ex parte Frankfeld* Dist. of Col. (1940), 32 Fed. Supp. 915 (unlawful commencement of criminal prosecution by Committee agents); *U. S.* v. *Blumberg*, Dist. of Col. (1940) Crim. No. 65,800 (unlawful search and seizure by Committee agents); *U. S.* v. *Dolson*, Dist. of Col. (1946), Criminal No. 65801 (unlawful arrests by Committee agents); cf. *U. S.* v. *Lovett*, 328 U. S. 303-313 (1946).

These judicial strictures have had no effect. The Committee's Hearings on the Motion Picture Industry in 1947, its so-called Espionage Hearings this year and the widespread condemnation evoked by them—its hearsay condemnation of the Southern Conference of Human Welfare so incisively analyzed by Professor Gellhorn (60 Harvard Law Rev. 1193)—these more recent episodes are typical of a longstanding record of which we have cited many other instances.

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Such a record may not be dismissed as so many "excesses" or "aberrations" and thus subtracted from the Committee's total significance. It is rather an integral part of any real Constitutional analysis of its powers because it demonstrates what such a grant of power to any organ of government must become . . . a continuing encroachment upon political thought, speech and assembly, a forced imposition of prescribed orthodoxy upon dissidence, a vehicle for compelling conformity by all to the political views of particular officials on pain of "exposure" and all its consequences. Cf. *Thornhill* v. *Alabama*, 310 U. S. at p. 98; *Yick Wo* v. *Hopkins*, 118 U. S. at pp. 373-374.

CONCLUSION.

Chief Justice Hughes in a distinguished paper has epitomized the constitutional principle here at stake: "Our institutions were not devised to bring about uniformity of opinion; if they had been we might well abandon hope. It is important to remember, as has been said, that the essential characteristic of true liberty is, that under its shelter many different types of life and character and opinion and belief can develop unmolested and unobstructed". (Charles Evans Hughes, Report of the American Bar Association, 1925, pp. 186-187.)

This Committee is a continuous violation of that principle. We ask this Court to declare unconstitutional the statute and resolution creating the Committee and, upon that ground, to reverse this conviction.

Respectfully submitted,

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